91-248

No. _____

In The

Supreme Court of the United States

October Term, 1991

JOSEF SEHNAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a prosecutor's improper comments on a defendant's failure to testify may ever be excused as harmless error.

PARTIES INVOLVED

All of the parties to the appeal to the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Josef Sehnal, defendant-appellant below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) designated for publication has not yet been reported. The decision of the district court (App. C) was given in open court and was not reduced to a formal written order.

JURISDICTION

The order of the court of appeals (App. A) was entered on April 17, 1991. A petition for rehearing with a suggestion for rehearing en banc was denied on July 10, 1991 (App. B). A timely motion for stay of the mandate was filed on July 17, 1991. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and Sup. Ct. R. 17.1(a)

CONSTITUTIONAL PROVISION INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> **No person shall be** held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be **compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 8, 1987, a federal grand jury returned an indictment against Josef Sehnal, the owner and president of a steel fabricating company, charging him with four counts of making and subscribing false income tax returns in violation of 26 U.S.C. § 7206(1). The charges

involved his 1980 and 1981 individual income tax returns and the February 1981 and February 1982 income tax returns of his corporation, Scorpio Steel, Inc.

Federal jurisdiction was conferred on the United States District Court for the District of Arizona by 18 U.S.C. § 3231 and Fed. R. Crim. P. 18.

During the jury trial which commenced on July 19, 1989, the prosecutor commented extensively upon the fact that Sehnal exercised his Fifth Amendment privilege against self-incrimination and did not testify.

The jury convicted Sehnal on the two counts relating to the corporate returns of Scorpio Steel but could not agree on a verdict on the two counts relating to his individual income tax returns.

The trial court, at the hearing on Sehnal's motion for judgment of acquittal on all counts, or in the alternative, motion for a new trial on the counts on which he was convicted, held at the time of sentencing, denied Sehnal's motion (App. C). The court of appeals affirmed Sehnal's conviction on the two corporate counts and dismissed his appeal from the district court's denial of the motion for acquittal (App. A). A petition for rehearing and suggestion for rehearing en banc was denied by the court of appeals (App. B). A timely motion for a thirty-day stay of the mandate of the court of appeals was filed on July 17, 1991.

REASONS FOR GRANTING THE PETITION

Griffin v. California, 380 U.S. 609 (1965), laid down the rule that the Fifth Amendment "forbids either comment

by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615.

Two years later the Court fashioned a harmless-constitutional-error rule to be applied to cases involving comment upon the defendant's right to remain silent. *Chapman v. California*, 386 U.S. 18 (1967). The Court rejected any "overwhelming evidence" of guilt analysis, and reaffirmed its opinion in *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), that "[t]he question is whether there is a *reasonable possibility* that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23 (emphasis added). Thus, the Court adopted the standard that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was *harmless beyond a reasonable doubt*." *Id.* at 24 (emphasis added). Applying that standard to the argument and comments of the prosecutor on the failure of the defendants to take the witness stand, the Court reversed a state court conviction and remanded the case for a new trial, declaring that "[p]etitioners are entitled to a trial free from the pressure of unconstitutional interference." *Id.* at 24-26.

Mr. Justice Stewart, concurring in the *result* of the *Chapman* decision, suggested that violations of *Griffin* could best be deterred by a rule of automatic reversal. *Id.* at 45. He saw no need to break with the precedent followed by the Court in a long line of cases, that constitutional violations are never "harmless."[1] *Id.* at 42.

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[1] Earlier that Term, the Court had reversed a conviction on the basis of *Griffin v. California* without considering whether

(Continued on following page)

In twenty-four years of applying *Chapman* to prosecutorial misconduct involving violations of the constitutional rights of criminal defendants, courts have strayed from the extremely narrow standard of harmless error defined by the Court, which permits the government to avoid the retrial of a defendant "only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant." *See Eberhardt v. Bordenkircher*, 605 F.2d 275, 278 (6th Cir. 1979).

The court of appeals in this case concluded that the prosecutor had indeed overstepped the boundary of acceptable argument and had posed questions to the jury whose answers could only have been provided by Sehnal, thus violating the standard of *Lincoln v. Sunn*, 807 F.2d 805, 810 (9th Cir. 1987) (prosecutor's allusion to facts that were within the knowledge of only two people might be presumed to be a reference to the failure of one of them to take the stand). In *United States v. Branson*, 756 F.2d 752 (9th Cir. 1985), the Ninth Circuit held that the prosecutor's repeated comments on the defendant's failure to provide exculpatory evidence, *to which the defendant and his counsel did not object*, was plain error and reversed and remanded for a new trial. *Id.* at 756. Nevertheless, the court of appeals in this case concluded (in hindsight) that the trial court's failure to check the prosecutor's

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the comment on a defendant's silence might have been harmless error. *O'Connor v. Ohio*, 385 U.S. 92 (1967).

improper comments on Sehnal's invocation of his constitutional privilege against self-incrimination did not constitute plain error under the standard of *United States v. Young*, 470 U.S. 1, 16 (1985), and *United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir.), *cert. denied*, 479 U.S. 1104 (1987).

The court of appeals applied a standard set in *United States v. Bryan*, 868 F.2d 1032, 1039 (9th Cir.), *cert. denied*, 110 S. Ct. 167 (1989): "There must be a *high probability* that the error materially affected the verdict." The requirement that the defendant demonstrate a "high probability" that the constitutional error committed here affected the verdict is at odds with the standard set by the Court in *Chapman* and *Fahy*: The government must demonstrate conclusively that there is no *reasonable possibility* that the evidence complained of contributed to the verdict. *Bryan* shifts the burden of proof to the defendant.

Application of the standard of *Bryan*, a case which involved the propriety of a jury instruction on unanimity of verdict, which, in turn relied on other cases requesting appellate review of jury instructions, was not appropriate in this case where the prosecutor was found to have improperly commented on the defendant's invocation of his Fifth Amendment privilege. It is respectfully suggested that the standard of *Chapman* – the constitutional error must be harmless beyond a reasonable doubt – was the appropriate standard to be applied by the Ninth Circuit.

Mr. Justice Stewart struck a compromise between his strong belief that it was inappropriate to inquire whether a violation of *Griffin v. California* was harmless by any

standard and his agreement with the Court's reversal of the convictions in *Chapman*. His concurring opinion indicates that he did so based upon his personal conclusion that "[p]rosecutors are unlikely to indulge in clear violations of *Griffin* in the future." History has shown his conclusion to be somewhat naive. He went on to state, however, that "[I]f they do I see no reason why the sanction of reversal should not be the result." *Chapman*, 386 U.S. at 45.

Recent opinions from the First, Sixth and Tenth Circuits (and even the Ninth Circuit) indicate that after years of being handcuffed by the harmless-constitutional-error rule, without any improvement in the conduct of prosecutors, courts now recognize that *Chapman* indeed has "open[ed] a hatch for harmless constitutional error . . . so gargantuan that constitutional rights [may be] minimized to infinitesimality" and bodes to become "a cover-up for every prosecutorial error." *See United States v. Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979). The Ninth Circuit, which has often excused as inadvertent and unintended prosecutors' comments on the failure of a *defendant* as opposed to *the defense* to provide exculpatory evidence, *e.g., United States v. Wasserteil*, 641 F.2d 704, 709 (9th Cir. 1981),[2] has recognized the danger of viewing such statements with the logic of hindsight rather than at their

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[2] The First Circuit has severely criticized the fine line that the Ninth Circuit and other courts have developed in cases such as *Wasserteil* to separate comment on the defendant's failure to testify and the failure of the "defense" to explain the evidence. *United States v. Skandier*, 758 F.2d 43, 46 (1st Cir. 1985); *United States v. Cox*, 752 F.2d 741, 745 (1st Cir. 1985). *Accord, United States v. Wilkins*, 659 F.2d 769, 774 (7th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

objective face value as the jury must be assumed to have taken them. *United States v. Sigal*, 572 F.2d 1320, 1322-23 (9th Cir. 1978). *See also United States v. Castillo*, 866 F.2d 1071, 1083-84 (9th Cir. 1988).

As the First Circuit noted in *United States v. Skandier*, 758 F.2d 43 (1st Cir. 1985):

> [T]he books are full of . . . opinions noting excesses in summations that . . . comment upon, or call the jury's attention to, the defendant's failure to take the stand, or tend to diminish the government's burden of proof. Our complaints that, at the least, such conduct raises unnecessary issues for appeals seem to fall upon inattentive ears, or stimulate new, supposedly ingenious, circumlocution.
>
> . . . .
>
> Although we do not reverse, we cannot avoid repeating that resort to the harmless error rule has unhappy consequences. . . . We do not propose to apply the harmless error rule with liberality, finding it better that a possibly undeserving defendant obtain a new trial, than that we must constantly police prosecutors. There persistence is well illustrated . . . .

Id. at 44, 45.

The Sixth Circuit, reversing and remanding state convictions in *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979), cited with approval the Fifth Circuit's opinion in *United States v. Hammond*, 598 F.2d 1008, 1013-1014 (5th Cir. 1979):

> The *Chapman* harmless error rule was not intended to be a cover-up for every prosecutorial error. . . . The constitution speaks in cosmic concepts or cosmic principles, and they

> are not to be grudgingly applied nor miniturized [sic]. We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights.

Eberhardt, 605 F.2d at 278-279. The court went on to opine that:

> [H]arm is presumed to have flowed from constitutional error; the burden is on the State to demonstrate conclusively to the contrary. It is not enough for the reviewing court to feel that the evidence is strong and that the defendant probably would have been convicted anyway. That is a decision for the jury to make, unaffected by improper argument or impermissible inferences urged by the prosecutor.

Id. at 279.

In *United States v. Barton*, 731 F.2d 669 (1984), the Tenth Circuit held that a prosecutor's "why didn't he explain it" remarks in rebuttal argument concerning matters that could have been explained only by the nontestifying defendant gave rise to an innuendo that the matters were not explained because the defendant did not testify. Therefore, the government attorney's remarks were comments, albeit indirect, on the defendant's failure to testify. "In light of the substantial nature of the right involved . . . such comments constitute 'plain error'." *Id.* at 674. The court found the lack of contemporaneous objection by defense counsel to be no bar to review of plain error. Concluding that the government had failed to meet its burden under *Chapman*, the court held the prosecutor's remarks to constitute reversible error, reversed the judgment of conviction and remanded for a new trial. *Id.* at 675.

Petitioner respectfully submits that it is time for the Court to resolve the conflict of the circuits regarding the harmless error rule of *Chapman* and to stem the tide of mischief it has wrought.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH [sic] SEHNAL, Defendant-Appellant.	No. 90-10012 D.C. No. CR-87-0101-PGR OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge Presiding

Argued and Submitted
February 12, 1991 – San Francisco, California

Filed April 17, 1991

Before: Mary M. Schroeder, William C. Canby, Jr. and John T. Noonan, Jr., Circuit Judges

OPINION

NOONAN, Circuit Judge:

Joseph [sic] Sehnal appeals his conviction of violating 26 U.S.C. § 7206(1) by making false statements on two corporate tax returns filed by Scorpio Steel, Inc. (Scorpio). He also appeals the denial of his motion for acquittal on charges of making false statements on two personal income tax returns – charges to which the jury could not agree. We affirm the conviction. We dismiss for want of

jurisdiction the appeal of the denial of the motion for acquittal.

THE EVIDENCE

At the age of 22, Joseph [sic] Sehnal came to the United States from Czechoslovakia in 1970, knowing no English. In November 1978 he started his own steel fabricating company, Scorpio, of which he was the sole stockholder and chief executive. Scorpio shaped and cut steel for building construction and sometimes installed the steel it sold. Scorpio through Sehnal normally did business by oral contracts – an exchange of words and a handshake would suffice. The business located in Phoenix, Arizona, prospered. By 1979 Sehnal was being paid a salary of $14,000 by the corporation; by 1980 his salary had increased to $45,000.

Sehnal and his wife Susan were trustees of a bank account for his six-year old son, Dennis. In September 1980 an IRS agent inquired as to deductions Scorpio had made for personal expenses of the Sehnals. Shortly thereafter Sehnal opened a new trust account, designating himself as sole trustee for his son, Dennis. He used a different branch of his regular bank and Scorpio's business address as the address for the account. In the next thirteen months Sehnal deposited thirteen checks into this account.

The chief source of money for these deposits was Mohawk Bridge and Iron Co. Mohawk in 1980-81 was engaged in erecting steel structures for a general contractor. Its president, Claud Hill, made three oral contracts

for fabricated steel with Scorpio. In Hill's words a contract for fabricated steel was complete when the steel was delivered.

When it came to payment, Hill broke the checks as follows:

> 9/15/80 - $18,650 to Joseph [sic] Sehnal and $5,000 to Scorpio.
>
> 1/7/81 - $9,816 to Joseph [sic] Sehnal and $19,000 to Scorpio.
>
> 9/17/81 - $4,400 to Joseph [sic] Sehnal and $15,600 to Scorpio.

At Sehnal's request, Hill's wife, the bookkeeper of Mohawk, entered on the check stubs a description of the purpose of the checks going to Sehnal as "consulting fees" or "consulting engineering fees." Hill, however, testified that Sehnal rendered no consulting or engineering services to Mohawk.

All of the checks from Mohawk to Joseph [sic] Sehnal were deposited by Sehnal in Sehnal's son's trust account, as was the $15,600 check made out to Scorpio.

Building up the trust account in this way from Mohawk and other companies with which Scorpio did business, Sehnal had at his disposal there approximately $50,000. Over the next eighteen months he gradually withdrew about $35,800 from the trust account and deposited the money in a personal checking account in the name of himself and his wife. On October 31, 1981, he then withdrew $30,000 from the checking account and purchased in his own name five acres of land in South Phoenix. He obtained a permit to construct a corporate building on the land.

On February 18, 1982 Sehnal opened a new checking account in his name doing business as "Desert Properties." On March 15, 1982 he transferred $3,500 from the trust account of which he was the sole trustee to the Desert Properties account. He thereafter transferred $19,600 over the next three months from the trust account of which he was the sole trustee to the Desert Properties account. The money was largely used to pay for labor and materials in constructing a corporate building on the five acres of land. On the completion of the building in 1982 Sehnal leased the land and building to Scorpio at a yearly rate of $22,800.

The balance of the funds originally deposited in Dennis Sehnal's trust account of which Sehnal was sole trustee was spent by the Sehnals on ordinary living expenses.

In February 1982 IRS agent Laura Samson began an audit of Scorpio's 1980 corporate return. She determined that Scorpio had taken a number of improper deductions for personal expenses of the Sehnals. As a result of this audit, Sehnal discharged his outside auditor-bookkeeper, Hy Spivack.

In August 1982 agent Samson met Sehnal's new accountant, Jonathan Grice. She suggested that Scorpio switch from a cash basis method of accounting to a completed contract method for the corporate return due February 28, 1981. The suggestion was accepted. The return was eventually filed on November 15, 1982. There was an understanding between Samson and Grice that certain problem areas could be adjusted after the return was filed. According to Samson, those areas related to travel

and entertainment deductions. According to Grice, it was his understanding that income could also be adjusted. Grice informed Sehnal before Sehnal signed the return that it would be audited.

On the corporate returns of Scorpio for the fiscal years ending February 1981 and February 1982 and signed by Sehnal there as no report of the checks deposited in Dennis' trust account. On Sehnal's personal income tax returns for the calendar years 1981 and 1982 there was no report of the checks deposited in Dennis's trust account. Neither Spivack nor Grice was informed of these checks at the time they prepared the returns.

THE CONDUCT OF THE CASE

The government presented witnesses from the companies which had dealt with Sehnal. They testified that the checks deposited in the son's trust account were checks issued in payment for steel delivered by Scorpio. The government also presented the testimony of Laura Samson and other IRS agents involved in the investigation. Most tellingly, the government presented the testimony of Hy Spivack, who testified that he had prepared the 1981 corporate return and the 1981 and 1982 personal tax returns. He testified that he told Sehnal that if cash was not deposited in the corporate account it would not be reported to the IRS on the corporate return. He also testified that Sehnal did not show him any of his personal bank account records.

Sehnal did not take the witness stand. The defense challenged the credibility of Spivack. The defense tried to

suggest that Sehnal could have rendered personal consulting services to the purchase[r]s of Scorpio's steel. The defense put on an expert witness to say that Scorpio was indebted to Sehnal and that the sums diverted from the corporation could have been the repayment of unrecorded loans. The defense emphasized Grice's testimony that the 1982 corporate return was filed with an agreement with the relevant IRS agent to adjust income.

Addressing the jury, the prosecutor stated that the government had to prove four things: (1) that Sehnal had signed his name to a tax return false in some material matter; (2) that the return had a declaration that it was signed under the penalty of perjury; (3) that Sehnal knew the return was false as to the material matter; and (4) that Sehnal had acted willfully. The prosecution said the only dispute was whether he had done so willfully. The prosecutor then elaborated on the evidence of deliberation, deviousness and deceit that showed Sehnal had concealed the trust account of which he was the sole trustee. At the same time the prosecutor pointed to Sehnal's intelligence and determination in building a business from scratch, so that it was impossible to think of him as a person totally unsophisticated in financial matters. The government pointed also to his motive: that the trust account was set up just after the Internal Revenue Service had begun to question the personal expenditures written off against the corporate income and that the trust account was set up in the year when the business had suddenly taken off and Sehnal had tripled his salary. The prosecutor said:

> Mr. Sehnal, when he put the money in his own pocket in his own trust account, knew

when he signed the return that none of those monies were reported to Mr. Spivack, showed up in the W-2 form in the way that the other monies did.

Indeed, this chart shows us that for both of those years, no – unreported $45,000.00 on the – his personal income tax return, he had not reported about half that money. A big enough sum so when he looked at the return and the figures written in there by Mr. Spivack, knew that didn't include almost half again what he had made.

He couldn't make a mistake or be mistaken about that as to the personal return for 1980. Again in 1981 he signed a return telling the IRS that he only made $52,000.00, when in fact he again made twice as much again that he didn't report.

At the climax of his argument the prosecutor said to the jury, referring to defense counsel Stephen E. Silver, "As you listen to Mr. Silver's argument, I want you to think about these questions. And when you listen to his argument, ask him, to yourself if he's answered these questions to your satisfaction. Ask him these hard questions."

The prosecutor then proceeded to ask a number of questions directed at Silver, adding the observation that Silver "has no burden to do anything in this case. He can sit on his hands in his chair and not make one word at all. It's the government's burden. But when he stands up, ask him if he's explaining to you why it is that none of these monies found their way into the corporate bank account."

After a series of questions in which it is unmistakable that Silver is being asked to explain the evidence, the

prosecutor used several questions where the pronouns "he" and "him" are used in a way that, while the prosecutor was continuing his imaginary colloquy between the jury and Silver, the pronouns clearly refer to Sehnal, so that there is confusion. Here are three of these questions:

> Ask him, if it's true, why did he set up the Desert Properties account, to funnel money in another account, if there's nothing to hide. Ask him that question. . . .
>
> Ask him why it was that Miss Samson asked for his personal bank statements in 1983, why it took three months to get them to her.
>
> In the end, ask Mr. Silver the hard question, is if this was all just a ruse, an idea to build the building for his corporation, why didn't he put the money into the corporation? . . .

In the first question the "he" must refer to Sehnal although the first and last "him" in context refer to Silver. In the second question the first "him" refers to Silver while "his" refers to Sehnal. In the third question Silver is referred to but the "his" and the "he" refer to Sehnal.

Silver did not object to the prosecutor's line of argument. In his own closing, Silver declared that he, Silver, would not engage in a question and answer exchange with the prosecutor. His statement implied that he saw the prosecutor's questions as addressed to defense counsel.

Silver did question the disappearance of the notes of an IRS agent's interview with the clear implication that failure to explain the disappearance pointed to something being hidden by the agent. In rebuttal the prosecutor

objected to Silver's "beating the government up, making you think the IRS is full of willful, wicked, evil people. The prosecutor continued, "It is not some monolithic entity bearing down on the taxpayer, they're human beings that work there. It's their job. And when they come in here and testify under oath, they take it seriously because it is the oath." Silver did not object to this response to his argument.

The jury returned a verdict of guilty as to both the 1981 and 1982 corporate returns. It failed to agree as to the personal returns. Sehnal moved for a judgment of acquittal as to the personal returns, and the motion was denied. Sehnal appeals to his court from both convictions and from the denial of the motion for acquittal.

ANALYSIS

Because the denial of Sehnal's motion for acquittal is not a final judgment, we do not have jurisdiction to review that denial. *United States v. Carnes*, 618 F.2d 68, 70 (9th Cir.), *cert. denied*, 447 U.S. 929 (1980). This portion of Sehnal's appeal must be dismissed.

On appeal, Sehnal's main argument is directed at the prosecutor's argument to the jury, principally to the questions the prosecutor invited the jury to ask.

The Prosecutor's Overzealous Argument. Tension exists between the privilege against self-incrimination and the natural response to the silence of the accused. "If someone is innocent, why doesn't he say so" is the average person's reaction to the silent defendant. Nonetheless, we have in our system made the decision that the right to

remain silent is an important protection of the person against governmental inquisition or torture. As the right is important, it has been necessary to surround the right with some procedural protection in the course of the trial lest the right be effectively eroded by prosecutorial exploitation of the common reaction to silence. Consequently, it is long-established constitutional law that comment by the prosecutor on the failure of the defendant to testify violates the guarantee of the Fifth Amendment. *Chapman v. California*, 386 U.S. 18 (1967).

Our court has developed a fine line separating comment on the defendant's failure to testify and the failure of the "defense" to explain the evidence. In a case involving the smuggling of watch movements, the three defendants did not take the stand. The prosecutor in his rebuttal argument said to the jury:

> How about the other evidence in this case that demonstrates that no duties were paid? How about the evidence of Mr. Friedman sending the watches back and forth from New York to Switzerland? How about the way this business was conducted? I asked all the defendants, invited them in my opening argument, to please explain to you how this legitimate business transaction worked in the hotel in Los Angeles, and the transportation of the suitcases.
>
> Did you hear an explanation from them? I invited them to give you one . . .

United States v. Wasserteil, 641 F.2d 704, 709 (9th Cir. 1981). The court observed this argument could be interpreted as being directed to the defendants' lack of testimony but, "considered within the context," the argument was such that it was unlikely that the jury drew such a conclusion.

In context, the argument could be understood as a reference to the lack of the explanation requested of the defense. The argument was, therefore, not in violation of the constitutional privilege. *Id.* at 704-10.

In *United States v. Castillo,* 866 F.2d 1071 (9th Cir. 1988), the defendants were convicted of narcotics violations. They had not taken the stand. The government in argument to the jury commented on Castillo's failure to present any evidence that he had not lived in the apartment of coconspirator De La Renta. The prosecutor asked if the contention were true that he had not lived there, "What would be the testimony the defendants would present?" The prosecutor also commented on the fact that neither Castillo nor De La Renta had been shown to have any other job except running cocaine. The court held that the government had "commented on Castillo's failure to produce evidence and witnesses, not on his failure to testify." *Id.* at 1083. At the same time the court observed that, while precedent required it to hold that the government's argument did not violate the Constitution, "we do so under compulsion of the law of this circuit and with strong misgivings. . . . Repeated resort to the type of argument employed here may compel some court some day to conclude that the risk that this tactic will cause jurors to focus on the defendant's failure to testify is intolerable." *Id.* at 1083-84.

In our case the prosecutor's initial questions for the jury to ask Silver were, in context, questions addressed to "the defense" not the defendant. They were not an ideal way of putting the government's case. They fell within the line of argument accepted in *Wasserteil* and *Castillo,* but at the same time warned against in *Castillo.*

The prosecution went on to overstep the boundary and to present argument that could easily have been understood as a comment on the defendant's failure to testify. The prosecution slipped in its use of pronouns so that questions that it claims were posed to Silver could have been read as posed only to Sehnal. The prosecution asked questions whose answers could only have been provided by Sehnal. Doing so, the prosecution violated the standard set in *Lincoln v. Sunn*, 807 F.2d 805, 810 (9th Cir. 1987) (prosecutor's allusion to facts that were within the knowledge of only two people might be presumed to be a reference to the failure of one of them to take the stand). The questions we have quoted should not have been asked. Had objection been made, the court should have excluded them. The questions ran the risk of violating Sehnal's constitutional right of silence.

Defense counsel, however, did not object to the questions. On appeal, some effort is made to excuse this failure by citing the trial court's expressed wish not to have many sidebars or interruptions of argument on unrelated grounds. But this mild expression of hope by the court was not a barrier to defense counsel objecting to possibly unconstitutional comment. When defense counsel had objected at the beginning of the argument to another aspect of the prosecutor's argument, the objection had been sustained. When defense counsel – an able and experienced lawyer – chose to remain silent, he waived his objections. *United States v. Kennedy*, 714 F.2d 968 (9th Cir. 1983), *cert. denied*, 465 U.S. 1034 (1984).

On appeal, therefore, we could only reverse on the basis of these improper comments if the court's failure to check them constituted plain error. Under that standard

the comments must have been "such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States v. Young*, 470 U.S. 1, 16 (1985); *United States v. Gwaltney*, 790 F.2d 1378, 1386 (9th Cir. 1986), *cert. denied*, 479 U.S. 1104 (1987). To obtain the exceptional remedy of reversal in a criminal case on the basis of plain error there "must be a high probability that the error materially affected the verdict." *United States v. Bryan*, 868 F.2d 1032, 1039 (9th Cir.), *cert. denied*, 110 S. Ct. 167 (1989). Reviewing the entire record as required by *Young*, 470 U.S. at 16, we conclude that there was not a high probability of the prosecutor's improper argument influencing the verdict and that there was no miscarriage of justice.

As the prosecution argued to the jury, there was no doubt at all that Sehnal had signed the corporate tax returns under a declaration of perjury and that he knew they were false. Sehnal's only real defense was that in good faith he had relied on the accountants Spivack and Grice. Spivack testified that Sehnal had never told him of the trust account. Even if a juror disbelieved Spivack, disbelieving Spivack would not furnish positive evidence that Sehnal had relied on him. With Spivack's testimony discounted, a juror would be left only with the testimony that Sehnal had set up the trust account and had not reported as corporate or personal income the checks there deposited. IRS Agent Dugger's memorandum stating that Spivack had advised Sehnal to deposit the checks in his personal account was based on hearsay and the source of the hearsay appears to have been Heinton, Sehnal's corporate counsel, who, although testifying as a defense witness, did not support this story. In any event, even if

this hearsay were believed by the jury, it would not show that Sehnal was in good faith in relying on such advice.

As to the 1982 corporate return, there is little more question. If the jury believed Grice, there was an agreement between Grice and an IRS agent that the return be filed with the understanding that the income figures could be adjusted. But Grice also testified that at the time he made this agreement he had no knowledge at all of the checks in the trust account; nor did the agent.

The agreement could not have been intended to cover that hidden set of transactions. Sehnal, who had not informed Grice of the trust account, could not have in good faith relied on Grice's advice to sign when he had concealed from Grice this major amount of income, and he could not in good faith have believed that any vague reference to income would include income which to this point he had hidden from everyone concerned with his taxes.

We conclude that it is unlikely that the improper argument affected the jurors' evaluation of either Spivack's or Grice's testimony and that there is a high probability that the improper argument did not affect the jury's conclusion that Sehnal willfully filed false corporate returns for 1981 and 1982.

A variety of other issues have also been raised on appeal.

Vouching. Sehnal objects that the prosecutor vouched for the IRS witnesses. The passages from his rebuttal that we have noted were not objected to at the time. The

failure to exclude them does not constitute plain error in terms of the standard just set out.

Multiplicity. The defense complains of "multiplicity" in charging Sehnal in counts 1 and 2 with falsification of his personal returns and in counts 3 and 4 with falsification of the corporate returns. The argument is without merit. Offenses are separate if each requires proof of fact that the other does not. *Blockburger v. United States*, 284 U.S. 299 (1931). The government had the burden to show the income that was the corporation's was not reported by it and the income that was Sehnal's was not reported by him. These were different facts. There was no multiplicity.

Variance. The defense contends that in the presentation to the grand jury the government proceeded on the theory that the corporate return for 1982 was based on a cash method of accounting and that the government presented the case to the petit jury on a contract completion basis. Such variance, if it occurred, was on an irrelevant issue. The government was not trying to show a deficiency in the tax paid but a falsity as to the items omitted. The method of accounting would not have affected the duty to include payments received for contracts completed. On either a cash basis or a contract completion basis, the items should have been reported.

Wilfulness. Finally, Sehnal attacks the instruction given by the trial court on wilfulness. The trial court refused to give a requested separate instruction that the defendant must have had "a specific intent to do something the law forbids" or "the specific intent not to do something the law requires to be done."

What the defendant sought comes from language approved by us in *United States v. Brooksby*, 668 F.2d 1102, 1104 (9th Cir. 1982). But the court did instruct the jury in these terms:

> An act is done willfully if done voluntarily and intentionally with the purpose of violating a known legal duty.

The instruction is taken from the *Manual of Model Jury Instructions for the Ninth Circuit*, § 5.05 at 76 (1989). It is a definition recently approved by the Supreme Court. *Cheek v. United States*, 111 S. Ct. 604 (1991). In substance it gave the same direction to the jury that the language proposed by the defense had sought.

A properly instructed jury, with ample evidence placed before it concluded that Joseph [sic] Sehnal was guilty of filing two false corporate returns. The prosecution presented a clear and convincing case and made, for the most part, a proper and spirited argument to the jury. The prosecution came close to jeopardizing its case through overkill in its argument. The case, however, was strong enough to preclude any finding of plain error.

AFFIRMED as to convictions; DISMISSED as to the appeal from the denial of the motion for acquittal.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH [sic] SEHNAL, Defendant-Appellant.	No. 90-10012 D.C. No. CR-87-0101-PGR ORDER [FILED JUL 10, 1991]

Before: SCHROEDER, CANBY and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. JOSEF SEHNAL, Defendant.	No. CR-87-0101-PHX-PGR Phoenix, Arizona December 18, 1989

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aid transcription.

THE COURT:

Before the Court is the defendant's motion for judgment of acquittal. And after review of the moving papers,

as well as hearing the arguments of counsel, the Court first will deal with the issue of multiplicity.

That really only becomes a matter of concern for the Court in the event that there is a conviction on Counts I and II. If indeed there are, then of course the law applicable to multiplicity would certainly be of concern to the Court and would be more appropriately directed at that stage.

Dealing with the issue of the sufficiency of the evidence as to Counts I and II, the jury was unable to agree as to a verdict on those particular counts, but the subsequent trial will certainly provide them the opportunity to focus on the sufficiency question, as well as the Court, in the event that there is a conviction.

As to the matter of Count III, the Court is of the opinion that there was sufficient evidence for this particular verdict, and the same rationale appears to Count IV for the return of the 81-02 return of Scorpio Steel.

The ongoing concern that the courts have with the improper argument of prosecutors concerning the defendant's constitutional right to remain silent is that somehow, in spite of the instructions provided by the court in every criminal case, that the prosecutor might somehow suggest to the jury that they should disregard the defendant's right to protection, guarantee against self-incrimination. And for that reason the courts must carefully listen to the argument and make sure that there is no representation by the government that defendant has some obligation to present evidence or to testify to explain away the particular charges.

The Court is well acquainted with the Castillo case. The Court participated in that particular decision. The Court has this issue presented to it on a virtual daily basis in the conduct of trials. The Court is always concerned that the prosecutor overstepped these bounds.

There is a right that the government has also to address closing arguments of the defendant, and in this particular case the Court did conclude that the arguments of the prosecutor were directed at the defense and not to the defendant's failure to testify.

As far as the instructions presented to the jury on the issue of willfulness, that has been addressed prior to the jury's verdict and the Court stands on its position in the record contained therein.

For all those reasons, the defendant's motion for a judgment of acquittal, or in the alternative, motion for a new trial on Counts III and IV, are denied.

No. 91-248

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOSEF SEHNAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether questions posed to the jury by the prosecutor during his closing argument constituted plain error.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-248

JOSEF SEHNAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A16, is reported at 930 F.2d 1420.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1991. A petition for rehearing was denied on July 10, 1991. Pet. App. B1. The petition for a writ of certiorari was filed on August 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury returned a four-count indictment charging petitioner with making false statements on two corporate tax returns and on two personal income tax returns, in violation of 26 U.S.C. 7206(1). Following a jury trial in the District of Arizona, petitioner was convicted on the counts involving his corporate returns; the jury could not agree on the counts involving his personal returns. On September 18, 1989, the district court sentenced petitioner to a five-year term of probation on each count and a total fine of $20,000.

1. Petitioner started his own steel fabricating company, Scorpio, in November 1978. The business prospered. In September 1980, shortly after an IRS agent inquired about deductions that Scorpio had taken for personal expenses of petitioner and his wife, petitioner opened a trust account for his six-year old son Dennis, designating himself as sole trustee. By October 1981, petitioner had deposited into that account approximately $50,000 in checks that were issued as payment on Scorpio contracts for fabricated steel. Pet. App. A2-A3.

At one point, petitioner withdrew $35,800 from the trust account and deposited it into a joint personal checking account he shared with his wife. On October 31, 1981, petitioner withdrew $30,000 from the joint checking account and purchased five acres of land in his own name; he also obtained a permit to construct a corporate building, which was ultimately leased to Scorpio, on that land. The remaining funds in the trust account were spent on labor and materials used to construct the corporate building or on the ordinary living expenses of petitioner and his wife. Pet. App. A3-A4.

In February 1982, IRS Agent Laura Samson audited Scorpio's 1980 corporate return and determined that the company had improperly taken a number of deductions for personal expenses of petitioner and his wife. As a result, petitioner discharged his outside auditor-bookkeeper, Hy Spivack. Pet. App. A4.

In August 1982, Agent Samson met with petitioner's new accountant, Jonathan Grice, and agreed that certain problem areas could be adjusted after the filing of the Scorpio corporate return, which was due on February 28, 1981. Samson testified that the agreement concerned travel and entertainment expenses; Grice testified that he understood that income could also be adjusted. Grice told petitioner before he signed the return that it would be audited. Pet. App. A4-A5.

The checks deposited into the trust account were not reported either on the Scorpio corporate returns for the years ending February 28, 1981, and February 28, 1982, or on petitioner's personal income tax returns for 1981 and 1982. Neither Spivack nor Grice knew of those checks when they prepared the returns. Pet. App. A5.

2. During closing argument at trial, the prosecutor asked the jury to consider whether defense counsel had answered several hard questions. Pet. App. A7. After reminding the jury that the defense had no burden to do anything and posing a number of questions that were clearly directed to defense counsel rather than to petitioner, the prosecutor asked several questions using the male pronouns "he" and "him" rather than referring by name to defense counsel. *Id.* at A8. Defense counsel did not object to this line of argument, and in his closing argument defense

counsel said that he would not engage in a question and answer exchange with the prosecutor. *Ibid.*

3. On appeal, petitioner contended, inter alia, that the prosecutor violated petitioner's Fifth Amendment right not to testify by posing questions to the jury that the defense had failed to answer. The court of appeals determined that certain of the questions should not have been asked and that, had a defense objection been made, the district court should have sustained the objection. Pet. App. A12. The court of appeals also concluded, however, that defense counsel, "an able and experienced lawyer" who previously had made a successful objection at the beginning of the prosecutor's closing argument, had waived his objections by choosing to remain silent. *Ibid.* Based on its review of the entire record, the court of appeals concluded that the comments were not plain error because the comments did not lead to a miscarriage of justice. *Id.* at A13.

ARGUMENT

Petitioner claims that his case warrants review by this Court because there is a conflict among the circuits regarding the proper application of the harmless error rule of *Chapman* v. *California*, 386 U.S. 18 (1967), to comments made by a prosecutor during closing argument. Pet. 7-10. That argument is meritless.

1. This case involves the plain error doctrine, not the harmless error rule. The Ninth Circuit properly decided this case under the plain error standard of review set forth in *United States* v. *Young*, 470 U.S. 1 (1985), because defense counsel did not object at trial to the portion of the prosecutor's closing argument that petitioner challenged on appeal. Thus, on

appeal the Ninth Circuit properly reviewed petitioner's claim for plain error, under Fed. R. Crim. P. 52(b), rather than for harmless error, under Fed. R. Crim. P. 52(a).

The plain error rule authorizes an appellate court to correct only "particularly egregious errors" that "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Young*, 470 U.S. at 15, quoting *United States* v. *Frady*, 456 U.S. 152, 163 (1982), and *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). As this Court noted in *Young*, "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" 470 U.S. at 15, quoting *United States* v. *Frady*, 456 U.S. at 163 n.14. Petitioner does not maintain that his claim merits review under that standard, and his fact-bound claim would not warrant review by this Court even if he had made such an argument.

As the court of appeals determined, there was no dispute that petitioner had signed the tax return and that he knew it was false; petitioner's only real defense was that he relied in good faith on the advice of his accountants, Spivack and Grice. Pet. App. A13. But each accountant testified that he was unaware of the trust account, so any advice they gave petitioner was based on his incomplete disclosure of the relevant facts. *Ibid.* Moreover, as the court of appeals concluded, there was no affirmative evidence of petitioner's good faith reliance on the advice of his accountants even if their testimony were discounted. *Id.* at A14. Under the circumstances, any error in the prosecutor's phrasing of his argument did not rise to the level of "plain error" because it could not have

"had an unfair prejudicial impact on the jury's deliberations." *United States* v. *Young*, 470 U.S. at 17 n.14.

2. Contrary to petitioner's claim, the decision in this case does not conflict with the decision of any other court of appeals. Petitioner cites *United States* v. *Skandier*, 758 F.2d 43 (1st Cir. 1985), and *Eberhardt* v. *Bordenkircher*, 605 F.2d 275 (6th Cir. 1979), but each of those cases applied the *Chapman* harmless error standard, not the plain error standard that the Ninth Circuit applied in this case.[1] In *Skandier*, defense counsel sought to make an objection at a bench conference, but was told by the district court that a conference was unnecessary, because the prosecutor had erred; the district court then gave a curative instruction. The First Circuit applied the *Chapman* standard and found the error harmless. 758 F.2d at 45-46. In *Eberhardt*, defense counsel objected to the prosecutor's remarks, and the Sixth Circuit applied the *Chapman* standard. 605 F.2d at 278-280.

Although the Tenth Circuit made a passing reference to *Chapman* in *United States* v. *Barton*, 731 F.2d 669, 675 (1984), that court did not hold that the *Chapman* harmless error standard and the *Young* plain error standard are interchangeable. Moreover, in conducting a plain error analysis in *Barton* the Tenth Circuit relied on its description of that analy-

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[1] Moreover, this Court has already answered the question framed in the petition: "Whether a prosecutor's improper comments on a defendant's failure to testify may ever be excused as harmless error." Pet. i. In *United States* v. *Hasting*, 461 U.S. 499 (1983), this Court held that a prosecutor's comment on a defendant's failure to testify can be, and in that case was, harmless error. See generally *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991).

sis in *United States* v. *Young*, 736 F.2d 565 (10th Cir. 1983), which this Court subsequently criticized in the course of reversing the judgment of the court of appeals, 470 U.S. 1 (1985).[2] Accordingly, there is no reason to assume that the Tenth Circuit would still apply the approach that it once described in *Young* and *Barton*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The *Young* case was decided before the *Barton* case, but was reported in a later volume of the Federal Reporter.

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